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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 352

GENERAL MOTORS CORPORATION; GENERAL MOTORS SALES CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION; GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

The Government's Statement of the Question Presented is Incomplete and Misleading.

The statement of the first question presented (which relates to the merits) appearing on page 2 of the Government's brief is incomplete and misleading in that (a) it fails to state that the affiliated finance company is a wholly-owned subsidiary of the manufacturer, (b) it fails to identify the commerce supposed to have been restrained, and

(c) it fails to state that the only restraint consisted of refusing to sell.

The ultimate question presented cannot be satisfactorily stated as simply as the Government has attempted. It is properly set forth in paragraph 1 and subparagraphs (a), (b), (c), (d) and (e) on page 11 of the petition.

The Government's Statement of the Facts is in Some Respects Inaccurate.

The government erroneously states in footnote 1 on page 3 of its brief that no attack is now made on the sufficiency of the indictment as a pleading and for this reason refrains from summarizing the allegations of the indictment in its brief. Under the heading "Questions Presented" (Pet., p. 11), the first paragraph is as follows:

> "Do the activities of petitioners *charged* and proved constitute a conspiracy in restraint of interstate trade and commerce in violation of Section 1 of the Sherman Law?"

Also the first error specified in the petition (p. 12) is that "the Circuit Court of Appeals erred in affirming the action of the trial court overruling the demurrer to the indictment." The question is thus raised whether the indictment was sufficient to charge a crime under Section 1 of the Sherman Law. *Harris* v. *United States,* 104 F. (2d) 41, 43. It is therefore essential to the disposition of the petition to consider the allegations of the indictment. They are sufficiently summarized on pages 3 and 4 of the petition.

The statement appearing on page 4 of the Government's brief that "if the services of other finance companies are used, such companies must advance the money necessary to pay for the cars at the time of shipment" is incorrect.

The same misstatement appears in footnote 7 on page 9. This is not a vital matter but, in the interest of accuracy, we set forth a correct statement of the facts in the margin.[1]

It is stated on pages 8 and 9 of the Government's brief that "dealers failing to use GMAC * * * were deprived of a reserve fund on the books of GMAC." This is incorrect. Again the misstatement is not vital, but we nevertheless set forth a correct statement in the margin.[2]

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[1] The precise manner in which the transaction is conducted is as follows: If a dealer wishes he may give a power of attorney to a person at the factory, authorizing the execution in his name of a trust receipt and promissory note covering shipments ordered by him. Thereupon the factory delivers the cars to a truck-away or drive-away company which delivers them to the dealer, at the same time sending the documents in question to the local GMAC branch office nearest to the dealer, with a sight draft for the amount of the shipment made out to cover either the full invoice price or 10 per cent thereof, so that the dealer may pay cash by taking up the draft for the full amount or finance at wholesale with GMAC and take up only the draft for 10 per cent. If the dealer elects to pay cash in full, he may either furnish it directly or obtain it by financing the transaction through an outside company. In no case does GMAC make any charge for collecting either the full amount of the shipment or 10 per cent thereof. The only charge which the dealer pays in connection with such a transaction is the charge for whatever wholesale financing he wishes, if any. Moreover, the dealer obtains possession of the shipment upon arrival at destination without having to wait to take up the sight draft (R. 842-844).

[2] No reserve fund is set up on the books of GMAC for dealers who do not make use of it (R. 944). Dealers who have an interest in the reserve fund by reason of having used GMAC do not lose such interest upon discontinuing such use but receive payment of the reserve in due course (Gov't Ex. No. 39, R. 3341).

ARGUMENT.

Under the following headings we deal with the contentions of the Government with respect to the reasons set forth in our petition for granting the writ, using our original numbering.

I.

THE GOVERNMENT HAS NOT DENIED THAT THE PETITION PRESENTS QUESTIONS OF GREAT PUBLIC IMPORTANCE WHICH HAVE NOT BEEN BUT SHOULD BE AUTHORITATIVELY DETERMINED BY THIS COURT.

II.

THE GOVERNMENT HAS FAILED TO RECONCILE THE DECISION OF THE COURT BELOW WITH THIS COURT'S INTERPRETATION OF THE SHERMAN LAW AS SET FORTH IN APEX HOSIERY CO. v. LEADER, 310 U. S. 469.

In dealing with this point the Government does not question the construction placed by petitioners upon the charging part of the indictment, namely, that the commerce alleged to have been restrained was the commerce between GMSC and the dealer organization. The indictment does not allege that the dealers are parties to the combination (Ind. par. 34, R. 9-10). That being so, the charge can have no reference to the commerce conducted by the dealers with their customers. This is the construction placed on the indictment by the Court of Appeals (R. 4611-4612) and the theory on which the case went to the jury (R. 1859, 1927).

Moreover, the Government does not deny that the commerce conducted by the dealers with their customers can-

not be interstate commerce. This is pointed out in the petition (footnote 41, p. 20) and is recognized by the Court of Appeals in its opinion (R. 4611-4612).

Further, no attempt is made to gainsay the statement appearing on page 19 of the petition that the finance business is not commerce and certainly not interstate commerce. This also is recognized by the Court of Appeals (R. 4607).

The Government's acquiescence in these contentions confines the issue to that of restraint of the commerce in automobiles between GMSC and the dealer organization, as contended in the petition.

Notwithstanding the foregoing concessions the Government makes the assertion at various places in its brief (pp. 12, 17) that there is a restraint both on the competition of the dealers and on that of outside finance companies. This is wholly irrelevant. In view of the Government's concessions, such restraints are not only outside the scope of the indictment but beyond the reach of the Sherman Law.

The Government has entirely misconceived the argument set forth in Point II of the petition. Our primary contention is that *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, reaffirms by implication the doctrine of *United States* v. *Colgate & Co.,* 250 U. S. 300, and similar cases, and that its definition of an actionable restraint as a restraint of commercial competition postulates the existence of competitors within the combination. The Government concedes that petitioners are not competitors but an economic unit (Govt. brief, p. 3). It follows that any restraint imposed by that unit in respect of its own commerce is not an actionable restraint under the Sherman Law but a manifestation of the very freedom of action which that law was designed to preserve.

For the same reason the Government's entire argument relative to *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, is beside the point. In that case there was a combination of economically independent competitors which imposed mutual restrictions upon their activities.

Petitioners recognize that the *Apex* case holds the Sherman Law applicable to transactions which tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, as stated on page 12 of the Government's brief. We insist, however, repeating the language of the petition (p. 21), that the restraint "must take place, altogether or to some extent at least, in a supply originating with an economic unit independent of the author of the restraint." It is this phase of our argument that the Government has entirely overlooked in its discussion of the *Apex* case and other cases cited on pages 12 and 13 of its brief.

Contrary to the statement on page 14 of the Government's brief, our basic assumption does not conflict with *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, or with *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373, or with *Fed. Trade Comm.* v. *Beech-Nut Packing Co.*, 257 U. S. 441. In the *Ethyl* case the thing condemned was a combination consisting of the defendant, refiners and jobbers which was used as a means of controlling jobbers' prices and suppressing competition among them. In the *Dr. Miles* case the thing condemned was a combination effectuated by a contract which embraced a manufacturer and his purchasers and restricted the competition of the purchasers among themselves in resale prices. In the *Beech-Nut* case the thing condemned was a combination, forced upon dealers by a manufacturer through conduct which went beyond a mere refusal to sell, whereby the dealers were compelled to restrict competition among themselves

in resale prices. In each case the statute was held to prohibit restraints upon the competition between rival sellers in a commercial market.[3] Here no such restraint has been shown. The only restraint charged and established is that involved in the determination of GMSC not to sell a car to a dealer, as the Court of Appeals squarely held (R. 4611-4612).

For the same reason the observation of the Government (brief, p. 15) that a corporation and its officers, or a corporation and its subsidiaries, can conspire to restrain the trade of others has no application to the instant case. Indeed, the failure of the Government to advert to the case of *United States* v. *General Electric Co.*, 272 U. S. 476, cited in the petition (p. 18), must be taken as an admission that numerous economic units, otherwise independent, may be welded into one economic unit through the mere formality of a contract of agency. Here the case is much stronger, for though the several petitioners are formally and legalistically separate entities, substantially and organically they are and always have been one economic unit.

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[3] The Government's statement of the holding of these three cases appearing on page 14 of its brief is erroneous. They do not stand for the proposition "that a manufacturer cannot, by threats to discontinue supplies, force wholesalers and retailers to adhere to fixed resale prices for his products." *United States* v. *Colgate & Co.*, 250 U. S. 300, squarely held that a manufacturer may refuse to sell to purchasers who will not adhere to fixed resale prices and may announce his intention in advance (p. 307) and this rule was approved in both *Federal Trade Comm.* v. *Beech-Nut Co.*, 257 U. S. 441, 452, and *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 457. See also *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565, where the court concluded "that the Raymond Company in threatening to withdraw its trade from the Snider Company exercised its lawful right, and that its conduct did not constitute an unfair method of competition within the meaning of the (Federal Trade Commission) act" (p. 574).

On page 13 of the Government's brief, it states:

> "In this case petitioners have discriminated against and threatened to curtail the supplies of purchasers who refuse to use G. M. A. C. to the extent desired, and thus have taken from buyers and consumers the advantages which accrue to them from free competition in the market."

In the *Apex* case the strikers who refused to permit shipment of 125,000 dozens of stockings not only threatened but effectuated curtailment of the supply of purchasers. But, despite the fact that the action of the strikers took "from buyers and consumers the advantages which accrue to them from free competition in the market", this Court held that it was not a violation of the Sherman Law.

Above all, the Government entirely overlooks the very essence of the *Apex* decision which is found in its approval of the holding in *Levering & G. Co* v. *Morrin*, 289 U. S. 103, as fully discussed at pages 19 to 21 of our petition.

III.

THE DECISIONS OF THE SECOND AND EIGHTH CIRCUIT COURTS OF APPEALS WITH WHICH THE DECISION OF THE COURT BELOW IS IN CONFLICT HAVE NEVER BEEN OVERRULED.

The Government attempts to avoid the effect of the decision of the Second Circuit Court of Appeals in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, by distinguishing it (brief, pp. 15-16), and that of the Eighth Circuit Court of Appeals in *Whitwell* v. *Continental Tobacco Co.*, 125 Fed. 454, by asserting that the latter is no longer good law (brief, pp. 16-17). The contentions advanced are invalid but we need not pause to consider them since the Government ends by conceding that a mer-

chant has a right to sell to whom he chooses (brief, p. 17), which is all we cited the cases for. It attempts, however, to escape from the effect of that rule by importing into it a qualification for which there is not a vestige of authority. Thus the Government's brief says (p. 17):

> "But this right does not permit the coercive imposition of conditions destructive of competition and free trade by a seller who dominates the market."

No decided case holds that a seller, *even though he dominates the market*, may not refuse to sell to anyone he sees fit for any reason whatever. Domination of the market has no bearing on the question. Even though the seller dominates it absolutely, as in the case of a patent, he may refuse to sell at will and may even give price cutting as a reason. This Court so held in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, where the present Chief Justice said (p. 457):

> "The picture here revealed is not that of a patentee exercising its right to refuse to sell or to permit his licensee to sell the patented products to price cutters."

It does not aid the Government to reiterate the point that the commerce restricted "is actually that of the dealers" (brief, p. 17). Suppose it is. There is no rule that a manufacturer is required to bring such commerce into existence by selling.

IV.

THE COURT BELOW ERRED IN EXCLUDING EVIDENCE.

1. *Fashion Guild* v. *Trade Comm'n*, 312 U. S. 457, does not justify the exclusion of our evidence that the restraint effectuated was reasonable. In that case the end sought

to be accomplished by the conspiracy was unlawful (p. 457). Here it was lawful (R. 4633). That being so, we should have been permitted to show that the methods adopted to accomplish the end were reasonable. The *Fashion Guild* decision itself so recognizes (p. 468).

This point was in effect conceded by the Court of Appeals itself. In the course of its opinion it said (R. 4609):

> "In our opinion the only possible excuse for imposition of the finance restrictions lies in the reasonableness of the GMAC rates, and in this connection there is no contention that other discount companies can not meet the requirement."

We did contend precisely that, viz., that other discount companies could not meet the requirements of proper financing. But the evidence was excluded by the trial court. Although upholding the exclusion (R. 4619), the Court of Appeals said in the same breath that, had we established what that evidence was intended to show, we might have justified our conduct (R. 4609). The exclusion was not only error; it was sufficiently important error to justify review, since it may have controlled the outcome of the case.

The fact that the effect of petitioners' conduct was to keep down the cost of financing does not make it bad. The statement in the *Fashion Guild* case referred to by the Government (brief, p. 19) is that *a combination* might be unlawful even if it permanently reduced prices (p. 467). There was no combination here,—only a single manufacturer.

2. The Government attempts to justify the exclusion of *all* of petitioners' dealer evidence on the ground that it would not have refuted the Government's dealer evidence (brief, p. 21). We respectfully say that our offers of proof (R. 1040-4, 1051-4, 1059-60, 1062-86, 1131-45, 1151-2, 1154-5, 1160-1, 1179-82, 1216-7, 1219-23, 1286-8) show that the con-

trary is true. The Government's dealer evidence was the basis for the inference that a conspiracy had been formed as charged. The Court of Appeals so expressly held (R. 4612). Our dealer evidence would have refuted this inference. *Wood* v. *The United States,* 16 Pet. 342, 359-361. Its exclusion was error and sufficiently serious error to justify review.

Respectfully submitted,

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